

character. Manifestly, this is not permissible. It is not difficult to cite an anthology of cases for this proposition but I need only refer to *Looi Guan Kway v. Low Lean Bok & Ors.*⁽²⁾ applied in *Grant Advertising International Inc. & Anor. v. Glaze.*⁽³⁾

It remains for me to consider the question of costs. Where a suit is instituted by solicitors on behalf of a company without authority there is authority for saying that its directors must bear the costs personally – *Re L. Y. Swee & Co. Ltd.*⁽⁴⁾ – and I so order.

Order accordingly.

Solicitors: *Dulip Singh & Co.; Lee Kok Liang & Co.*

HO SHEE JAN v. STEPHENS PROPERTIES SDN. BHD.

[O.C.J. (Chan J.) November 10, 1984]

[Kuala Lumpur – Originating Summons No. C108 of 1981]

Company Law – Shares – Transfer of – Refusal to register – Veto of transfer must be exercised within a reasonable time – Companies Act (Cap. 185), ss. 105 & 162.

Company Law – Shares – Transfer of – Refusal to register – Whether transfer properly lodged – Estoppel by conduct – Companies Act (Cap. 185), ss. 105 & 162.

Contract – Commercial contracts – Doctrine of fair play in commercial conduct.

The applicant was the transferee of 279,300 shares in Stephens Properties Sdn. Bhd. By A21 of the Articles of Association of the company, the transfer form which should have been left at the company's registered office was instead left with the company secretary. However, the company acknowledged receiving the transfer in a letter of December 24, 1980 and advised that his application for the transfer of the shares had been tabled before the board on December 1, 1980, Art. 23 of the Articles of Association of the company expressly lays down that if the directors refuse to register a transfer they shall have to serve notice of the refusal to the transferee within one month after the date on which the transfer was lodged. In this case between December 24, 1980 and May 22, 1981 nothing was done, a delay of over five months. On May 22, 1981 the applicant was informed that the board of directors had decided against the registration of the transfer.

The applicant contended that the company's power of veto against the transfer of the shares had been lost by undue delay.

A In defence the company raised for the first time in these proceedings objections that the transfer was not properly lodged at the registered office of the company.

B Held: (1) the proper time for the exercise of the power of the veto is the occasion at which the transfer is placed before the board for confirmation or within a reasonable time from that date. In the present case the board had by unnecessary delay lost its chance of exercising its power of veto against the transfer of the shares to the applicant.

C (2) as regards the company's contention that the transfer had not been properly lodged the company cannot blow hot and cold as it suits it. Applying the principle of estoppel by conduct to the present case it would be unfair or unjust to allow the company to say that the transfer was not lodged at the registered office when the board had let the applicant believe that the lodgement was valid by considering the question of the transfer at the company's board meeting.

D Cases referred to:

- (1) *In re Copal Varnish Co. Ltd.* [1917] 2 Ch. 349, 353.
- (2) *In re Swaledale Cleaners Ltd.* [1968] 1 W.L.R. 432, 436; [1968] 1 W.L.R. 1710.
- (3) *In re Bede Steam Shipping Co.* [1917] 1 Ch. 123, 132.
- E (4) *In re Hackney Pavilion Ltd.* [1924] 1 Ch. 276, 279-280.
- (5) *Moodie v. Shepherd (Bookbinders) Ltd.* [1949] 2 All E.R. 1044.
- (6) *Panchaud Freres S.A. v. Et. General Grain Co.* [1970] 1 Lloyd's Rep. 53, 56-57.
- (7) *Toepfer v. Cremer* [1975] 2 Lloyd's Rep. 118, 123.
- F (8) *Cerealmangimi v. Toepfer* [1981] 1 Lloyd's Rep. 337.
- (9) *Bremer v. Mackprang* [1979] 1 Lloyd's Rep. 221, 340-341.

ORIGINATING SUMMONS.

G R. Lazar for the plaintiff.
K. S. Narayanam for the defendant company.

Cur. Adv. Vult.

H Chan J.: The woes of Mr. Ho Shee Jan began when he, as the transferee of 279,300 shares in Stephens Properties Sdn. Bhd., tried to have the shares registered in his name.

I It is not very clear who the transferor of those shares is as his name has been left out in all the affidavits. Mr. Ho Shee Jan, in one of his affidavits, has mentioned that

"the shares in question belonged to a company controlled by one K.K. Sharma, which company had pledged their shares as security to Lloyds Bank International, Singapore and which bank in exercise of their rights of hypothecation had disposed [of] the said shares."

I do not think that the transaction which Mr. Ho has described is a hypothecation in the strict legal sense. *Holden*, Law and Practice of Banking, 6th ed., Vol. 2, p.276, para. 22-11 puts it thus:

"Hypothecation is a legal transaction whereby goods may be made available as security for a debt without transferring either the property or the possession to the lender. ... The term 'hypothecation' is used in another sense, which is rather confusing. When a banker accepts a pledge of documents of title to goods, his customer usually signs a memorandum setting out the terms of the transaction, which is often referred to as a 'letter of hypothecation.' This is a loose use of the word, synonymous with 'pledge' and should not obscure the fact that the transaction is not hypothecation in the strict legal sense."

I think what is meant is that the shares have been pledged to the bank and that the word "hypothecation" has been used not in the strict legal sense. On the other hand, the company has, on June 11, 1981, written to say "the Board has decided against registering the transfer of 279,300 shares of \$1/- each from MPC Holdings Sdn. Bhd. to Ho Shee Jan." However, I do not think the point is important for the determination of this case. Moreover, it has not been suggested in any affidavit that the transferor is not a member of the company and, therefore, it can be reasonably assumed that he is.

In *In re Copal Varnish Co. Ltd.*,⁽¹⁾ Eve J. said:

"... alike in a public and a private company, a shareholder has in my opinion, to use the language of Lord Cozens-Hardy M.R. in *In re Bede Steam Shipping Co.* [1917] 1 Ch. 123, 132, a property in his shares, a property which he is at liberty to dispose of, subject only to any express restriction which may be found in the articles of association of the company.' That statement is, I think, as applicable to a private company as to a public one, subject only to this observation, that, whereas in a public company it is not necessary that there should be any agreement *inter socios* operating as a restriction of the right of transfer, in the constitution of a private company some restriction must be found."

In *In re Swaledale Cleaners Ltd.*⁽²⁾ Pennycuik J. put it thus:

"It is well established that a share in a company is an item of property freely alienable in the absence of express restriction under the articles: see *In re Bede Steam Shipping Co. Ltd.* [1917] 1 Ch. 123. It is also well established that where the articles of a company contain a power of veto by the board, such as that here, the right of alienation is only displaced by a positive resolution of the board exercising the power: see *In re Hackney Pavilion Ltd.* [1924] 1 Ch. 276, where Astbury J. uses the expression (at p.280) 'a formal active exercise of the right to decline.' That decision was approved by the House of Lords in *Moodie v. W. & J. Shepherd (Bookbinders) Ltd.* [1949] 2 All E.R. 1044, H.L. (Sc.)."

A From the passages which I have just read, it follows that in the present case the transferor, whoever he may be, had a property in his shares of which he had a right to dispose of subject only to any express restriction in the articles of association. For in the words of Lord Cozens-Hardy M.R. in *In re Bede Steam Shipping Co.*⁽³⁾:

B "He has a property in his shares, a property which he is at liberty to dispose of, subject only to any express restriction which may be found in the articles of association of the company."

C And in the words of Scrutton L.J. in the same case, at p.137:

D "Ordinarily speaking, every share of a shareholder is transferable without restrictions. It is his property, and the Court will protect the holder, but because it is not desirable in the interests of the company that unrestricted alienation should take place the practice has grown up of inserting certain restrictions on the power to transfer."

Those express restrictions are to be found in art. 23 which is in these terms:

E "23. The Directors may, in their discretion, and without assigning any reason therefor, refuse to register a transfer of any share to any person of whom they do not approve and they may also refuse to register a transfer of any share on which the Company has a lien. If the Directors refuse to register a transfer they shall within one month after the date on which the transfer was lodged with the Company serve [on] the transferee notice of the refusal in accordance with section 105 of the Act."

F And section 105(1) of the Companies Act 1965 provides:

G "105.(1) If a company refuses to register a transfer of any shares debentures or other interests in the company it shall, within one month after the date on which the transfer was lodged with it, send to the transferor and to the transferee notice of the refusal."

It also follows that this power of veto can only be exercised by the board by a positive resolution.

H This is well established from the cases. In *In re Hackney Pavilion Ltd.*⁽⁴⁾ Astbury J. in his judgment said, at pp. 279, 280:

I "The sole question is whether the directors have declined registration under art. 26, as unless they have so declined the applicant is expressly given a right to registration by that article. Now the right to decline must be actively exercised by a vote of the Board ad hoc. At the actual Board meeting there was a proper quorum, but as the Board was equally divided, it did not and could not exercise its right to decline. Nothing was or could be done in the matter. The mere failure to pass the resolution for registration proposed by Rose and opposed by Kramer

was not a formal active exercise of the right to decline within art. 26 and, in stating that under their powers the directors had declined to register, the secretary was in error, and had exceeded his instructions. The applicant's absolute right to registration therefore remains intact, and the register must be rectified accordingly."

In re Hackney Pavilion Ltd. (supra) was approved by the House of Lords in *Moodie v. W. & J. Shepherd (Bookbinders) Ltd.*⁽⁵⁾ This is what Lord Porter said, at p.1050:

"The respondent, John Shepherd, ... contended that under art. 20 the directors had an absolute discretion to refuse to register any transfer of shares of which they did not approve, and that, unless some such approval was given, the company was under no obligation to register them in the name of anyone of whom they did not approve. This argument, no doubt, would be effective if the directors had as a body disapproved of the transfer, but, inasmuch as one director alone disapproved, there cannot be said to have been any refusal by the board, and, in my view, the board and not the individual director must disapprove within the terms of the article. The mere failure to pass a resolution is not a formal active exercise of the right to decline, as Astbury, J., said ([1924] 1 Ch. 280) in *Re Hackney Pavilion Ltd.*, and, in my view, a formal active exercise of the right of refusal to register is required before the company is authorised to refuse to register the shares in the names of those to whom they have been transmitted."

Lord Normand said, at pp. 1050 to 1051:

"The veto must be actively exercised: see *Re Hackney Pavilion, Ltd.* Here, however, there are only two directors and they are in disagreement, one of them being in favour of granting the appellants' application and the other against. The deadlock has prevented the exercise of the veto by the directors as a body and the claim of the appellants to be registered cannot be countered by invoking the discretionary veto."

Lord Morton of Henryton said at p. 1052:

"The ... objection ... fails because there has been no decision by the directors to decline or suspend registration. One director was in favour of registration and the other was against it: see *Re Hackney Pavilion Ltd.*"

And Lord Reid also said, at p. 1054:

"... I agree with your Lordships that directors can exercise their right to decline registration only by passing a resolution to that effect."

In the instant case, Stephens Properties Sdn. Bhd. says that it had exercised its power of veto against registering the shares in favour of Mr. Ho Shee Jan. According to the company, the decision was made at a board meeting on May 22, 1981.

It is not Mr. Ho Shee Jan's case that there has been no decision by the board of directors. It is not his case that the veto (if it still exists) has not

A been actively exercised. What Mr. Lazar is saying is that because the board has taken an unreasonable time in arriving at its decision, the power of veto must be regarded as lost. The transfer was first brought before the board on December 1, 1980. Nothing was done between that date and May 22, 1981, a delay of over five months. He relied on *In re Swaledale Cleaners Ltd. (supra)* affirmed by the Court of Appeal in [1968] 1 W.L.R. 1710. This is what Pennycuik J. said, at pp. 436, 437:

C "The issue on the present motion is whether the power of veto has been lost by undue delay in bringing the transfers before a meeting of the board. On analysis this involves two distinct questions, namely (1) has there in fact been undue delay, and (2) if so, has the delay put an end to the power.

D (1) It has been decided, in a case where articles of a company contained no restriction on transfers, that the proper time for bringing a transfer before the board is the first board meeting after the transfer has been lodged at which, in the ordinary course of business, a transfer would be confirmed, and that if the transfer is not brought before the board on that occasion there is unnecessary delay within the statutory predecessor of section 116: see *In re Joint Stock Discount Company, Nation's Case* (1866) L.R. 3 Eq. 77. The issue there was an entirely different one, namely, who was to be treated as a contributory in a winding-up, but the principle is, I think, of general application. I see no reason why the principle should not equally apply where the articles do contain a restriction on transfers. It must, however, habitually happen in the case of a private company that board meetings are not held regularly, at any rate for the purpose of considering transfers. Where this is the position the transfer must, I think, be brought before the board within a reasonable time after it is lodged. What is a reasonable time must depend on the particular circumstances, and one cannot lay down any precise conventional time. But the period of two months mentioned in clause 19 of Table A under the Act of 1929, and now specified in section 78 of the Act of 1948, may, I think, safely be taken as the outside limit after which there is unnecessary delay.

H The position is not, I think, different in this respect where the board has been reduced below the quorum capable of acting, but where there is a continuing director with power to appoint additional directors. I am not concerned here with the exceptional cases where it is impossible for some reason to constitute a board. In the present case the transfers were lodged on or before August 3, 1967. Major Smart has throughout been in a position to appoint an additional director, and then to bring the transfers before a properly constituted board meeting. Nothing was done between August 3 and December 18, a delay of over four months.

I I conclude that in those circumstances there has been unnecessary delay.

(2) The power of veto is a restriction on the right of alienation and as such must, I think, be exercised at the proper time for its exercise, if it is to be exercised at all. For this purpose the proper time is the occasion at which the trans-

fers are placed before the board for confirmation if – and it seems to me only if – they are so placed without unnecessary delay. If there is unnecessary delay in placing the transfers before the board, the power of veto must, I think, be regarded as lost, so that the right of transfer becomes unrestricted. It cannot be the law that the board of company can improperly delay considering a transfer and then when driven to do so, as for instance here, by the launching of a motion, exercise the power of veto. There appears to be no authority upon this point.

I conclude that Major Smith has, by unnecessary delay, lost his chance of keeping the beneficial owner of the majority of shares in this company off the register, and I propose to make the order sought by the motion.”

Although *In re Swaledale Cleaners Ltd. (supra)* is a case where the power of veto had been lost by reason of the unnecessary delay in placing the transfers before the board, the principle is, I think, of general application. I see no reason why the principle should not apply equally to a case where there has been unnecessary delay by the board in coming to a decision.

But then, countered Mr. Narayanan, there has not been any unnecessary delay by the board in the present case. He said that on December, 1980 the directors had asked for evidence of the transfer of the shares. Art. 21 allows them to make such a request.

“Art. 21. Subject to the restrictions of these Articles, shares shall be transferable but every transfer shall be in the usual common form or in such other form as the Directors shall from time to time approve, and shall be left at the Office accompanied by the certificate of the shares to be transferred and such other evidence (if any) as the Directors may reasonably require to show the right of the transferor to make the transfer.”

This is what the letter from the company says:

“December 24, 1980

Messrs Shearn Delamore & Co
2 Benteng
Kuala Lumpur 01-19

Dear Sirs

Re: Share Transfer – 279,300 shares in Stephens Properties Sdn Bhd.

We refer to your letters dated November 3 and December 4, 1980 and would advise that your application for the transfer of the above-mentioned shares has been tabled before the Board on December 1, 1980.

It has however deferred making any decision thereon pending your submission of such evidence to show the right of the transferor to make the transfer.

A In the circumstances, we shall be pleased if you could furnish us the necessary documents pertaining thereto for the Board's consideration.

Yours faithfully

Sgd.
Secretary”

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Mr. Narayanan pointed out that Mr. Ho Shee Jan did not furnish to the company the evidence which would show the right of the transferor to make the transfer as required. Instead, on February 21, 1981 Mr. Ho submitted his own particulars. C With respect to Mr. Narayanan, if evidence of the right of the transferor to make the transfer is so important to the company, then the company ought to have replied to Mr. Ho's letter and pointed out to him that what was really required was evidence of the transferor's right to make the transfer and since this was not supplied the board would proceed to make its decision under art. 23. But nothing was done by the company until April 9, 1981 when its company secretary wrote the following letter:

E “April 9, 1981

Shearn Delamore & Co
P.O. Box 138
Kuala Lumpur 01-02

Dear Sir

F *Re: Share Transfer – 279,300 shares in Stephens Properties Sdn. Bhd*

We refer to your letter dated March 26, 1981 and would advise that the above matter will be discussed at the next Board Meeting to be held sometime in April, 1981 and thereafter we shall inform you of the Board's decision accordingly.

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Yours faithfully
for PROJECTS FOR ASIA (MANAGEMENT) SDN BHD

Sgd.
John Low

H Director”

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This was followed a month later by a letter from the company secretary of Projects for Asia (Management) Sdn. Bhd., informing Mr. Ho's solicitors that the board meeting which was to be held in April has been postponed to May 22, 1981. On June 11, Mr. Ho's solicitors received this letter from the company secretary:

“June 11, 1981

Shearn Delamore & Co
P O Box 138
Kuala Lumpur 01-02

Dear Sirs

Re: Stephens Properties Sdn Bhd
Transfer of 279,300 shares

On behalf of our client we refer to our letter dated May 15, 1981 and would advise that at the directors' meeting held on May 22, 1981, the Board has decided against registering the transfer of 279,300 shares of \$1/- each from MPC Holdings Sdn Bhd to Ho Shee Jan.

In the circumstances we return herewith the transfer deed dated October 3, 1980 and the share certificate no. 23 for 279,300 shares in Stephens Properties Sdn Bhd for your attention.

Yours faithfully
for PROJECTS FOR ASIA (MANAGEMENT) SDN BHD

Sgd.
JOHN LOW
Director"

Although art. 21 allows the company to ask for evidence to show the right of the transferor to make the transfer, this does not mean that the board can unnecessarily delay making a decision on the transfer. If the board must exercise its right of veto, it must be done within a reasonable time. As it turns out, nothing was done between December 1, 1980, *i.e.*, the date the transfer was first before the board, and May 22, 1981 when the board exercised its rights of veto by refusing the registration of the transfer of the shares to Mr. Ho Shee Jan. Art. 23 says that:

"If the Directors refuse to register a transfer they shall within one month after the date on which the transfer was lodged with the Company serve to the transferee notice of the refusal in accordance with section 105 of the Act."

Even assuming that December 1, 1980 is the beginning date, that is, by treating the date when the transfer was first brought before the board as the date of lodgement, the directors would still have to make up their mind by January 1, 1981. Instead of appreciating the urgency of the matter, they waited until Christmas eve (December 24, 1980) before deciding to write to Mr. Ho asking for evidence of the right of the transferor to make the transfer. Even at such a late stage, the board could have insisted from Mr. Ho an immediate reply. And if this had been done, the board could still reach a decision before or by January 1, 1981. But nothing was done by the board until very much later — May 22, 1981 — when the board decided against the registration of the transfer.

"The power of veto" said Pennycuick J. in

- A *In re Swaledale Cleaners Ltd.*, (*supra*) at p. 437, "is a restriction on the right of alienation and as such must, I think, be exercised at the proper time for its exercise, if it is to be exercised at all. For this purpose the proper time is the occasion at which the transfers are placed before the board for confirmation." If there is unnecessary delay by the board in reaching a decision after the transfer had been placed before it, the power of veto must, in my judgment, be regarded as lost, so that the right of transfer becomes unrestricted. "It cannot be the law" said Pennycuick J., at p. 437, "that the board of a company can improperly delay considering a transfer and then when driven to do so ... exercise the power of veto." In my judgment, the proper time for the exercise of the power of veto is the occasion at which the transfer is placed before the board for confirmation or within a reasonable time from that date. But in the present case, it must not be later than "one month after the date on which the transfer was lodged with the company": see art. 23.

E I, therefore, conclude that the board has by unnecessary delay lost its chance of exercising its power of veto against the transfer of the shares to Mr. Ho Shee Jan. It has lost its chance of keeping the registration of Mr. Ho's shares in the company off the register.

F I, therefore, grant Mr. Ho's application under section 162 of the Companies Act 1965 that the directors may be ordered to register the transfer of the shares. The right of transfer remains intact. The register must be rectified accordingly.

G There is, however, one other point. Mr. Ho Shee Jan did not actually leave the transfer at the registered office of the company. Mr. Narayanan pointed out that art. 21 says that the transfer form "shall be left at the office." The word "office" within the meaning of art. 2 means "registered office." Leaving the transfer with Projects for Asia (Management) Sdn. Bhd., the company secretary, is not good enough, argued Mr. Narayanan. Mr. Ho Shee Jan did not deny this. In fact, his counsel Mr. Lazar admits that the transfer was not sent to the registered office of the company. It was sent to the office of the company secretary. He suggested that it is reasonable to assume that in the ordinary course of business the company secretary would have taken the transfer to the office of the company. This must be so because the company had acknowledged receiving the transfer in its letter of December 24 1980. I

have previously referred to this letter. However, for the sake of clarity, I reproduce the part which shows the admission.

"We refer to your letters dated November 3 and December 4, 1980 and would advise that your application for the transfer of the above-mentioned shares has been tabled before the Board on December 1, 1980."

I agree with Mr. Lazar's submission. Art. 21 says that every transfer "shall be left at the office." Leaving the transfer at the office is effected by lodging it at or sending it to the office. It may be done by the transferor or the transferee or another person. But once that has been done, i.e., the transfer has been left at the office of the office of the company, the requirement contemplated by the article has been satisfied. It is quite clear that someone must have done it and in this particular instance, that person must have been the company secretary. How else could the application for the transfer of the shares be placed before the board on December 1, 1980 if it had not been received by the company? What is most revealing is that the company has never, in any of its letters, raised any objection about the way the transfer was lodged with the company. It was raised for the first time in these proceedings. The company did not reject the application on the ground of improper lodgement. In actual fact, the directors went on to consider the question of the transfer of the shares at their meetings as if it had been lodged properly with the company.

The company must be fair in its dealings. This doctrine of fair play is described by Lord Denning M.R. as a doctrine of estoppel by conduct. This is what the Master of the Rolls said in *Panchaud Freres S.A. v. Et. General Grain Co.*⁽⁶⁾:

"It is well settled that if a buyer rejects and gives one ground for it, he is not confined to that ground. If he afterwards finds out another ground on which he was entitled to reject, then in the ordinary way he can rely on that ground also. That is clear from *Taylor v. Oakes, Roncoroni & Co.*, (1922) 38 T.L.R. 349. It is similar to the rule that if a man dismisses a servant on one ground, he is not confined to that ground. If he afterwards find another ground justifying his dismissal, he can rely on that too. But this rule is subject to the qualification that a man may by his conduct preclude himself from setting up the later ground. We had, a little while ago, a case where a man was dismissed for one particular piece of dishonesty. At the trial the employer realized that he would not succeed in proving that particular dishonesty. So, during an adjournment, he got evidence of another piece of dishonesty and tried to raise it. But we did not allow it. He had fought the case on the earlier ground, and it would not be fair to allow him to rake up another ground at that stage. It is not, strictly speaking, a case of waiver but of estoppel by conduct.

A This doctrine of estoppel by conduct underlies the dictum of Mr. Justice Devlin (as he then was) in *Kwei Tek Chao & Ors. (trading as Zung Fu Co.) v. British Traders and Shippers Ltd. N.V. Handelsmaatschappij J. Smits Import-Export, Third Party* [1954] 2 Q.B. 459, at pp. 480 and 481; [1954] 1 Lloyd's Rep. 16, at pp. 48 and 49. It is so very apposite that I will read it in full:

B "... If there is a late shipment, as there was in this case, the date of the shipment being part of the description of the goods, the seller has not put on board goods which conform to the contract description, and therefore he has broken that obligation. He has also made it impossible to send forward a bill of lading which at once conforms with the contract and states accurately the date of shipment.

C Thus the same act can cause two breaches of two independent obligations.

However that may be, they are distinct obligations, and the right to reject the documents arises when the documents are tendered, and the right to reject the goods arises when they are landed and when after examination they are found not to be in conformity with the contract.

D There are many cases, of course, where the documents are accepted but the goods are subsequently rejected. It may be that if the actual date of shipment is not in conformity with the contract, and the error appears from the documents, the buyer, by accepting the documents, not only loses his right to reject the documents, but also his right to reject the goods, but that would be because he had waived in advance reliance on the date of shipment.' [Emphasis added.]

E Mr. Justice Devlin used the word 'waived'. But he used it in its popular sense. Not in its legal sense. When 'waiver' is used in its legal sense, it only takes place when a man, with knowledge of a breach, does an unequivocal act which shows that he has elected to affirm the contract as still existing instead of disaffirming it as, for instance, in waiver of forfeiture: see *Matthews v. Smallwood*, [1910] 1 Ch. 777. In the present case Mr. Justice Roskill thought that Mr. Justice Devlin had used 'waived' in that sense: and he held that these buyers had not waived the right to reject for late shipment because they had not got actual knowledge of that breach. At most they had constructive notice of it:

F and our commercial law sets its face resolutely against any doctrine of constructive notice: see *Manchester Trust v. Furness*, [1895] 2 Q.B. 539, at p. 545, by Lord Justice Lindley, and *Greer v. Downs Supply Company*, [1927] 2 K.B. 28, at p.36, by Lord Justice Scrutton.

G The present case is not a case of 'waiver' strictly so called. It is a case of estoppel by conduct. The basis of it is that a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has taken to be settled or correct, see the cases I referred to in *Central Newbury Car Auctions Ltd. v. Unity Finance Ltd. & Anor. Mercury Motors, Third Parties*, [1957] 1 Q.B. 371, at p. 380. Applied to the rejection of goods, the principle may be stated thus: If a man, who is entitled to reject goods on a certain ground, so conducts himself as to lead the other to believe that he is not relying on that ground, then he cannot afterwards set it up as a ground of rejection, when it would be unfair or unjust to allow him so to do. Mr. Lloyd gave a good illustration. Suppose, he said, in this case the bill of lading had contained the true date of shipment - Aug. 12 - (whereas the last date under the con-

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tract was July 31): so that, when the buyer took up the documents, he could have seen, if he had read it, that the date of shipment was Aug. 12. If he did not trouble to read it, but instead took up the documents and paid for them, he could not afterwards reject the goods on the ground of late shipment. Even though he had not read the bill of lading – and so was ignorant of the late shipment – he could not afterwards reject the goods on that ground: for the simple reason that he had the full opportunity of finding out from the contract documents what the real date of shipment was: and yet he did not trouble to do so. It would not be fair or just to allow him afterwards to reject the goods. Mr. Evans was inclined to accept this illustration as correct. Another instance can be given from the ordinary sale of goods. If a buyer does not choose to examine the goods when they arrive, and puts it off beyond a reasonable time, he loses his right to reject; see sect. 35 of the Sale of Goods Act, 1893. Although he did not know they were not in conformity with the contract, nevertheless, by letting a reasonable time go by, he loses his right to reject.”

And Lord Justice Winn in the same case said at p.59:

“There is a very good discussion of waiver in *Chitty* on Contracts, 23rd ed., General Principles volume 1, at par. 1241 and the following paragraphs. I do not take time to quote from those paragraphs; it is quite clear on referring to them that the learned authors treat, and I think rightly treat, ‘waiver’ as derived either from agreement or from a quasi estoppel. In my own judgment it does not seem possible in this case to say affirmatively that there was here either a fresh agreement, to rescind or vary the original contract, or anything which, within the scope of the doctrine as hitherto enunciated, could be described as an estoppel or a quasi estoppel. I respectfully agree with my Lord that what one has here is something perhaps in our law not yet wholly developed as a separate doctrine – which is more in the nature of a requirement of fair conduct – a criterion of what is fair conduct between the parties. There may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negating any liberty to blow hot and cold in commercial conduct.”

The present case seems to me to fall within the principle enunciated by Lord Denning M.R. and Winn L.J. in the passages which I have just read. The company cannot blow hot and cold as it suits it. If the company thought the transfer was not lodged at the registered office as required under art. 21, then it should have said so. If the company chose not to say so and proceeded to consider the transfer at its board meetings as if the transfer had been lodged properly with the company, it must put up with the consequences. It would not be fair or just to allow the company afterwards to say that the lodgement was invalid. The company cannot now turn round and say that the transfer was not lodged at the registered office. By holding the board meetings to consider the transfer without reference to the ques-

tion of improper lodgement, the directors are precluded afterwards from complaining that the transfer was not lodged at the office of the company.

The principle in *Panchaud's* case (*supra*) was applied in another case by the Court of Appeal: *Toepfer v. Cremer*.⁽⁷⁾ Lord Denning M.R. reiterated the principle thus, at p.123:

“When one person has led another to believe that a particular transaction is valid and correct, he cannot thereafter be allowed to say that it is invalid or incorrect where it would be unfair or unjust to allow him to do so. It is a kind of estoppel. He cannot blow hot and cold according as it suits his book. So in this case, seeing that the sellers put forward the notice as valid for their own purposes – and induced the buyer to accept it as valid – they cannot now turn round and say it is invalid.”

Therefore, applying the principle to the present case, it would be unfair or unjust to allow the company to say that the transfer was not lodged at the registered office when the board had led Mr. Ho to believe that the lodgement was valid by considering the question of the transfer at the company's board meeting. It does not matter that the company was unaware of the irregular lodgement at the time. If the directors had checked with their registered office, they would have known about it.

Panchaud Freres S.A. v. Et. General Grain Co. (*supra*) has been described by Lord Denning as “probably the case most frequently cited in the Commercial Court, although the text-book writers hardly notice it.” He writes: “In [that] case the new extension of estoppel by conduct was used to overcome the limitation of the old common law doctrine of ‘waiver’. That doctrine only applied where the party waiving a breach had actual knowledge of it. *Panchaud Freres* (*supra*) extended it to cases where there was no knowledge but only conduct on which the other acted.” – see *Denning*, *The Discipline of Law* at p.210. And at p.213, he writes:

“The new concept of waiver was however applied by the House of Lords in *Bremer v. Vanden* [1978] 2 Lloyd's 109, and by the Court of Appeal in *Toepfer v. Cremer* [1975] 2 Lloyd's Rep 118 at 123 and *Intertradex v. Lesieur* [1978] 2 Lloyd's Rep. 509. In each case the sellers served a notice of ‘force majeure’ which was defective. The buyers demanded delivery in such circumstances as to lead the sellers reasonably to believe that the buyers accepted it as a good notice. It was held that the buyers had ‘necessarily waived any defect it might contain whether they were aware of it or not’ – by Lord Salmon in *Bremer v. Vanden* [1978] 2 Lloyd's Rep at 127; and this was applied by the majority of the Court of Appeal in *Bremer v. Mackprang* [1979] 1 Lloyd's Rep. 221.”

Lloyd J. in his judgment in *Cerealmangimi v. Toepfer*⁽⁸⁾ applied the principles stated in *Bremer v. Mackprang*.⁽⁹⁾ This is what he said, at pp. 340-341:

"I take the law from what I believe to be the most recent authority in the Court of Appeal on this topic, namely, *Bramer Handelsgesellschaft m.b.H. v. C. Mackprang Jr.*, [1979] 1 Lloyd's Rep.221. Lord Denning, M.R., reviewed a number of cases including the decision of the House of Lords in *Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A.*, [1978] 2 Lloyd's Rep. 109. He quoted a passage from Lord Salmon's speech (at p.225) as follows:

... To make an unequivocal representation or waiver, it is not necessary for the buyers to say – 'We hereby waive it'. It is quite enough if they behave or write in such a way that reasonable sellers would be led to believe that the buyers were waiving any defect there might be in the notice and were accepting it as effectively extending the date of delivery ... If the buyers, by their telexes or by their conduct lead the sellers to believe that they accepted the notice as a good notice, they necessarily waived any defect it might contain, whether they were aware of it or not ..."

Lord Denning went on to state the principle thus:

"I regard the decision of the House in *Bremer v. Vanden* as a most important decision on waiver. As Mr. Davenport said, it is the final step in the series [starting with] *Central London Property Trust Ltd. v. High Trees House*, [1949] K.B. 130. ... Applied to cases of waiver in GAFTA cases, it may be stated thus: If a buyer, who is entitled to reject goods or documents on the ground of a defect in the notices or the timing of them, so conducts himself as to lead the seller reasonably to believe that he is not going to rely on any such defect – whether he knows of it or not – then he cannot afterwards set up the defect as a ground for rejecting the goods or documents when it would be unfair or unjust to allow him to do so."

Lord Justice Shaw expressed himself in complete agreement with [the] views stated by Lord Denning. He said at p.230:

"[Conduct] need not be such as to amount virtually to an express declaration that this or that right is waived or surrendered. If in the prevailing conditions affecting the position of the parties to a contract the conduct of one of them affords a reasonable foundation for the inference that he is prepared to forgo any right or rights he may have in a certain regard and the other contracting party does draw that inference and persists in the residual contractual relationship upon that basis, then whether it be regarded as waiver or estoppel the foregoing of those rights cannot thereafter be gainsaid. This seems to me the effect of the observations of Lord Salmon in *Bremer v. Vanden* ..."

Later in the same judgment Lord Justice Shaw said:

"[The buyers'] Counsel sought to reinforce his argument

A against the implication of waiver by laying emphasis on the buyers' ignorance as to whether, on the facts if and when they became known, the sellers could claim to be exonerated from liability for failing to deliver as required by their contract. I see no reason, however, to limit the effect of waiver to rights known to exist. It may be embracing enough, and so intended, as to forgo rights which might exist in regard to a particular contract or in a particular context."

B Lord Justice Stephenson dissented. In his view the majority in *Bremer v. Mackprang* were carrying the doctrine of waiver further than it had been carried by the House of Lords in *Bremer v. Vanden*. But Lord Justice Stephenson's judgment contains this important paragraph (at p.229):

"I do not understand Lord Salmon's reference to the buyers waiving any defect in the notice under cl. 22 'whether aware of it or not' as laying down any principle that there can be waiver or equitable estoppel on the part of someone who does not know that his rights have been infringed or has not, at the least, such obvious means of knowing that his rights have been infringed that the other party can reasonably assume that the party waiving or estopped is acting with knowledge of their infringement. Lord Salmon was, I think, referring to a patent defect which could only be missed by not reading the notice or not knowing the law."

I propose, therefore, to make the order sought by the summons. The company must pay the costs.

F Order accordingly.

Solicitors: *Shearn Delamore & Co.*; Ng Ek Teong & Partners.

G SALIM BIN DAWING v. LIM KAT KANG

[O.C.J. (Shankar J.) December 13 & 26, 1984]

[Johore Bahru – Civil Suit No. 311 of 1981]

H Damages – Quantum – Distinction between damages for loss of future earnings and loss of earning capacity – Principles applicable in claim for loss of earning capacity.

Damages – Leg – Shortening 3cm. – Fractured femur, tibia and fibula etc.

I The plaintiff who was a 29 year old clerk in the Education Department, Johore, met with an accident while riding his motor scooter. He suffered the following injuries: fracture of the lower 1/3 of the right femur, the right tibia and fibula, and the right 2nd and 3rd metatarsal bones. There was a permanent shortening of 3 cm of the right leg, a stiffness of the right ankle and subtalar joints with an equinus or plantar-flexion deformity at the ankle and deformity in the 2nd and 3rd toes. As a result of the injuries, he could